No. 87-5666/87-6026

87-5765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE MARTINEZ HIGH,

Petitioner,

vs.

WALTER ZANT, Warden,

Respondent.

HEATH A. WILKINS,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND THE SUPREME COURT OF THE STATE OF MISSOURI

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BRIEF FOR AMICUS CURIAE

DEFENSE FOR CHILDREN INTERNATIONAL-USA

INTEREST OF AMICUS CURIAE

This brief is submitted amicus curiae by Defense for Children International-USA (DCI-USA), with and on behalf of Defence for Children International (DCI), whose mandate is to ensure the worldwide promotion and protection of the internationally recognized principles of the United Nations Declaration of the Rights of the Child. DCI is a non-governmental organization (NGO) founded in Geneva, Switzerland in 1979 as one of the initiatives of the International Year of the Child, with individual members, affiliates and supporters in more than 57 countries, and national sections in 17 countries. DCI-USA is the United States section of the movement with local chapters in New York City, New York, New England, Pennsylvania, North Carolina and Florida. It has individual members, supporters and affiliates in more than 30 states.

DCI is in consultative status with the United Nations Economic and Social Council and with UNICEF; has served as the elected Secretariat of the Ad Hoc NGO Group on the Drafting of the Convention on the Rights of the Child since 1983; works closely with the United Nations Commission on Human Rights Open Ended Working Group on the Convention; and acts as the convenor of the NGO working party to draft the United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty.

DCI-USA is a member of the National Coalition Against the Death Penalty and of the United Nations NGO Committee on Human Rights; and acts as consultant to UNICEF on the International Rights of the Child.

ARGUMENT

I

NOT ONLY CONTEMPORARY STANDARDS IN THE UNITED STATES AS A WHOLE, BUT ALSO INTERNATIONAL NORMS AND PRACTICES OF OTHER NATIONS, SUPPORT THE CONCLUSION THAT IMPOSITION OF THE DEATH PENALTY FOR CRIMES COMMITTED BY JUVENILES CONTRAVENES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THIS NATION'S CONSTITUTION.

In drawing the line at the age of sixteen with regard to the question of the constitutional permissibility of juvenile executions, the plurality of the Court in Thompson v. Oklahoma [hereinafter "Thompson"] expressly recognized (56 U.S.L.W. at 4896)[1]

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[1] It is indeed disheartening that the dissent in Thompson (56 U.S.L.W. at 4907 n.4) so offhandedly dismissed the relevance of international norms even in the limited context of interpreting the Eighth Amendment. Was it really meant to sugges that this Court can altogether dismiss the very existence of international human rights law, when the United States itself, and all official international bodies, including the International Court of Justice, have long proclaimed its ascendancy? To take the example used by the dissent to its untenable ultimate conclusion, it would not be of constitutional relevance even if the United States were at some point in time to be the only nation in the world imposing the death

that, in assessing the Eighth Amendment's proscription of cruel and unusual punishment, this Court must look not only to prevailing

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penalty, or for that matter, the only nation in the globe inflicting such a penalty on juveniles. As shown below in this brief, the execution of juveniles involves international norms of legal, even jus cogens, stature, which are binding on the United States under both international treaty law and international customary law, let alone being relevant in assessing the reach of the Eighth Amendment. Suffice it to state here that, as more fully discussed below, the United States has ratified and voted for, respectively, two global international treaties which outlaw juvenile executions. One has been ratified by virtually all nations, and the other was adopted unanimously by the United Nations and has so far been ratified by 87 countries. Not only did the United States vote for this covenant at the time of its adoption but it subsequently supported a resolution of the U.N. General Assembly proclaiming the binding force on all U.N. members of the covenant's prohibition against juvenile executions. Moreover, the United States is legally bound by the Charter of the United Nations, the constitution of the international community, to promote human rights in cooperation with that world body. By reneging on a legal norm of the United Nations, the United States violates international constitutional law binding on it.

The thesis posed by the dissent in Thompson can be carried to dangerous extremes. It can be used, one dare say, to support any sort of unconscionable state conduct so long as it is

standards, practices and attitudes within the United States, but also to those obtaining in the international community. This is the clear mandate flowing from, e.g., Weems v. U.S., 217 U.S. 349, 378 (1910); Trop v. Dulles, 356 U.S. 86, 101 (1958); Coker v. Georgia, 433 U.S. 584, 596 n. 10 (1977); Enmund v. Florida, 458 U.S. 782, 796, n. 22 (1982).

DCI shares the view supported by the plurality in Thompson that, through the laws of most states of the Union[2] declarations of

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supported by majorities whose blind passions and prejudices of the day might be kindled and exploited by official demagogy. It is common knowledge that the United States itself and the international community as a whole, in the Nuremberg principles, have long rejected such an approach.

[2] Fourteen states plus the District of Columbia have no valid capital punishment statutes. Of the rest, twelve states directly establish the age of eighteen as the minimum age for execution (thus a majority of twenty-seven jurisdictions does not allow the execution of juveniles below eighteen); three set the age at seventeen; three have it at sixteen. Thompson, 56 U.S.L.W. at 4895, 4902.

authoritative bodies,[3] and the extreme paucity of actual executions of juveniles throughout its history[4] the American society as a whole has amply demonstrated its aversion to the phenomenon, leading to the conclusion that it deems it cruel and unusual punishment and thus spelling its constitutional doom under the rationale of the above cited cases.

In particular (conceding arguendo that the death penalty itself is constitutionally permissible, to begin with), the age limit of eighteen marks the ultimate threshold that must be crossed if imposition of capital punishment on a young person is to pass

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[3] Thompson, 56 U.S.L.W. at 4896. See also National Commission on Reform of Federal Criminal Laws, Final Report of the New Federal Code 3603 (1971); National Council of Juvenile and Family Court Judges, Resolution 2 (July 14, 1988).

[4] Thompson, 56 U.S.L.W. at 4897. See also W. Bowers, Legal Homicide 54(1984); V. Streib, Death Penalty for Juveniles 191-208 (1987); NAACP Legal Defense Fund, Death Row, U.S.A. 1 (May 1, 1988).

constitutional muster, even if one only takes into account the American experience. Not only is that age limit prevalent in the relevant statutes of the individual states (see supra note 2), but persons under eighteen actually executed in the United States account for only about 2% of all executions in the history of the nation (see supra note 4). Of these, the six executed from 1960 to now all were seventeen at the time of commission of their respective crimes,[5] which comes so close to the eighteen age limit (seventeen is the age limit, furthermore, prescribed by only three United States jurisdictions[6]) as to warrant the assimilation of the two.

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[5] V. Streib, Testimony on the Death Penalty for Juveniles (offered to the Subcommittee on Criminal Justice regarding House Bill 343, 99th Cong., June 5, 1986) (mimeo). See also V. Streib, Persons Executed for Crimes Committed While Under Age Eighteen (July 15, 1986) (unpublished memorandum).

[6] See supra note 2.

Eighteen, moreover, is the age at which laws in the United States recognize or accord certain faculties, prerogatives and rights to young persons. The age of civil majority in all jurisdictions of the Union stands at eighteen or over.[7] At that age persons have the right to vote in federal elections (prior to 1971, before eighteen-year olds were granted the right to vote, the age of majority in most states was in fact twenty-one); enlist in the armed forces, that is risk death in defense of their country, without parental consent (they can enlist with parental consent at seventeen); and marry without parental consent, according to the laws of most of the states.[8] Most states also show solicitude for the young by requiring them to be either

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[7]Petitioner's Brief, Appendix A; M. Soler, et al., Legal Rights of Children in the United States of America, in 2 Law and the Status of the Child 683 (A. Mamalakis Pappas ed. 1983) [hereinafter "Soler"]

[8]Soler, supra note 7, at 683-684.

eighteen or twenty-one before they can consume alcoholic beverages.[9] And, of course, the laws protect persons below the age of civil majority by not giving them the unfettered right to enter into contracts (if they do, their contracts are voidable at their option).[10]

These examples make a compelling case for outlawing executions of those who have not attained at least the age of eighteen at the time of the punishable offense. They, indeed, stand in sharp contrast to the specter on the other hand of state-sanctioned killing of the very same young persons, in the very same country, for crimes committed before they have attained the level of maturity and capacity for independent and reasoned action that the civil law uniformly demands. Any semblance of

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[9]Id. at 684-685.

[10]Id. at 713. The age of majority is eighteen or over acccrding to the laws of all states. See supra text accompanying note 7.

rationality in penal statutes, such as the ones now in question before this Court, is eclipsed in the context of the broader American landscape; and their arbitrariness, inequity and ultimate cruelty and inhumanity offend the conscience. Devoid of rationality, such laws, dealing as they do with a final and irrevocable outcome, with the deliberate unalterable destruction of human beings, and, as the plurality in Thompson recognized (56 U.S.L.W. at 4898), serving no legitimate goals of punishment or other substantial interest of the State, must not be sanctioned by this Court.

A rational uniform minimum standard[11] is needed in this nation to govern this most

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[11]The dissenting opinion in Thompson (56 U.S.L.W. at 4908), recognizes that "at some age a line does exist"; and even concedes that there is a general "reduction in willingness to impose capital punishment" (id. at 4907). That line should be drawn at eighteen, being as it is there where the overwhelming majority of all indicators converge.

fundamental issue of human rights and human dignity across the entire land. (And eighteen is the minimum age limit for which a legal foundation can be laid just from legal building blocks found within these shores, as posited above.) The grave issue of life or death should not be left to the vagaries of the uninformed opinions, local prejudices and parochial passions of the day, and to fortuitous circumstances of time and place, particularly where it concerns the young who are supposed to be the wards of society. (This issue patently is not on an equal footing with most of the matters left to the states for regulation in our federal system.) Allowing the status quo to continue would let stand the incoherent, checkered legal tableau which the Inter-American Commission of Human Rights only recently, in the case of James Terry Roach and Jay Pinkerton [hereinafter "Roach"], held "results in the arbitrary deprivation of life and inequality before the

law" and contravenes the American Declaration of the Rights and Duties of Man.[12]

The case for fixing on age eighteen as the threshold limit, however, becomes even more compelling and overwhelming when one factors into the Eighth Amendment analysis (as one must, as noted above) the inter-State comparative and international perspectives.

The abundant evidence of national practices across the globe and norms of international law opposed to the execution of juveniles, laid out in the companion briefs and under Point II below, need not be reiterated here. Such evidence must at least be used to inform this Court's interpetation of the Eighth Amendment. And, for purposes of this concrete task of construction alone, the Court need not necessarily reach the conclusion that the norms in question are

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[12]Resolution No. 3/87, Case 9647 (United States), OEA/Ser. L/V/II.69, Doc.17, p. 39, para. 61 and p. 40 (27 March 1987).

sufficiently crystallized or legally binding on the United States (though on the basis of a fortiori reasoning the weight to be given such evidence, even just in the context of Eighth Amendment analysis, increases in proportion to its quantitative and qualitative strength, culminating in its having a conclusive bearing if it shows the existence of settled norms of international law).

DCI, however, firmly endorses the view that this Court confronts and need pass upon a second contention that it poses in tandem with other amici: that execution of youths below the age of eighteen at the time of commission of the crime is unquestionably prohibited by international law, law to which the United States is clearly subject and which this Court is competent and duty-bound to uphold and apply.

II

INTERNATIONAL LAW, INCLUDING CONVENTIONAL (TREATY) AND CUSTOMARY GLOBAL LAW, BINDING ON THE UNITED STATES PROSCRIBES IMPOSITION OF THE DEATH PENALTY ON PERSONS YOUNGER THAN EIGHTEEN AT THE TIME OF COMMISSION OF THE OFFENSE, AND THIS COURT IS DUTY-BOUND UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION TO INVALIDATE CONTRAVENING LAWS AND PRACTICES OF THE STATES OF THE UNION.

In support of this contention, DCI will avoid burdening the Court with unnecessary repetition of matter contained in companion briefs, with all of which it concurs. Instead emphasis will be placed on supplementary arguments, which should help give an exposition of the fuller dimension of this aspect.

A. The Source and Nature of International Law

Article 38(1) of the Statute of the International Court of Justice sets forth the subject-matter jurisdiction of the Court and, in effect, defines the substantive content of international law. It lists, inter alia, treaties, international custom and general

principles of law recognized by civilized nations.[13] As regards treaties, of course, the Statute embodies the old rule of pacta sunt servanda, which proclaims the binding

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[13] It reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

   b. international custom, as evidence of a general practice accepted as law;

   c. the general principles of law recognized by civilized nations;

   d. ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

force of treaty stipulations vis-a-vis States parties.[14]

The other sources of transnational law, however, are not as clear-cut. The Inter-American Commission on Human Rights in Roach (see supra note 12) listed the following elements of customary norms of international law: "(a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; (b) a continuation or repetition of the practice over a considerable period of time; (c) a conviction that the practice is required by or consistent with prevailing international law; and (d) general acquiescence in the practice by other states."[15]

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[14]This rule was codified in Article 26 of the Vienna Convention on the Law of Treaties, U.N. Doc A/CONF. 39/27 (1969), reprinted in 8 I.L.M. 679 (1969) [hereinafter "Vienna Convention"].

[15]Supra note 12, at 31, citing II

As this definition indicates, it has never been the view that anything approaching unanimity or even majority participation in the relevant practice of States is necessary. The quantum of practice needed would logically vary inversely according to the quantitative and qualitative weight contributed by the other constitutive elements of the custom referable to any particular norm.

The subjective element mentioned in the quoted definition, known as opinio juris, appears to be losing ground as a strict requirement when it comes to practice that patently has substantial legal content. As early as 1969, Judge Lachs of the International Court of Justice stated, in the North Sea Continental Shelf Cases, that the "general practice of States should be

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International Law Commission Y.B., 1950, p. 26, para. 11.

recognized as prima faciae evidence that it is accepted as law."[16]

Dissenting States cannot defeat a customary rule of international law if, in spite of their dissent, a sufficient degree of generality of practice is achieved (acquiescence by some "other States" not by all other States, or the other States, is necessary). Whether a dissenting State itself can be held bound by the rule hinges on its being able to "show that it has expressly and consistently rejected the rule since the earliest days of the rule's existence."[17]

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[16]Quoted in Henkin, Pugh, Schachter and Smit, International Law, Cases and Materials 65 (2d ed. 1980) [hereinafter "Henkin"].

[17]M. Akehurst, A Modern Introduction to International Law 32 (4th ed. 1982). The author points to the adverb "always" used by the International Court of Justice in the Anglo-Norwegian Fisheries Case, 1951 I.C.J. 116, 131. Another authority on the subject has posited that the International Court of Justice "has never yet treated [litigants'] acceptance of the practice [in question] as a sine qua non of applying the custom to them."

In addition to custom, international law, according to the International Court's Statute, encompasses general principles of law recognized by civilized nations. "Civilized" in this context naturally refers to those well governed nations extending progressive, enlightened and humane treatment to their citizens and others.

In his dissenting opinion in the South West Africa Cases, Judge Tanaka of the International Court discussed the implications of this provision of the Court's Statute vis-a-vis human rights and observed that such rights "are not the product of a particular juridical system...but the same

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Waldock, General Course on Public International Law, 2 Recueil des Cours 1, 50 (1962), reprinted in Henkin, supra note 16, at 67. In the North Sea Continental Shelf Cases, the International Court of Justice stated in dictum that "general or customary law rules and obligations..., by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favor." 1969 I.C.J. 38-39.

human rights must be...protected everywhere man goes....Only one and the same law exists and this is valid through all kinds of human societies in relationships of hierarchy and coordination." Application of Article 38(1)(c), therefore, is not limited "to a strict analogical extension of certain principles of municipal law." Taking the view that human rights are grounded in natural law and are part of the jus cogens, he concluded that, by the very nature of human rights, and by the very nature and purpose of Article 38(1)(c), consent of the States is not required as a condition precedent to the formation of an international rule through the operation of this provision of the Statute. Further he opined that recognition by all the civilized States is not required, nor that the recognition take the form of an official act.[18]

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[18] 1966 I.C.J. 296-300. See also the separate opinion of Judge Ammoun in Barcelona

In the case of fundamental human rights, therefore, the normative process has an additional dimension. Such rights are rooted in the "conscience and reason of mankind through the ages,"[18] and are sui generis when compared with the traditional transnational norms of old. They, therefore, warrant special jurisprudential accommodation. For one, human rights precepts are more readily amenable to classification, at one and the same time, as rules evolving through the practice of States on the global plane (international customary norms) and also as "general principles of law recognized by civilized nations." When this duality is there, it logically follows that less weight need be placed on the scale when weighing normative content pursuant to just one of the

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Traction, infra note 20 at 302-06.

[19] See dissenting opinion of Judge Tanaka in the South West Africa Cases, supra note 18.

two formulas inherent in those two categories of substantive international law.

Secondly, there is a certain logical inconsistency in an insistence on strict positivist requirements of State auto-limitation with regard to the formation of basic international human rights law. The International Court of Justice has noted that obligations of States "concerning the basic rights of the human person" are obligations "towards the international community as a whole....By their very nature...[they] are the concern of all states...they are obligations erga omnes."[20] It has also stated in regard to the Genocide Convention that "in such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest.... Consequently, one cannot speak

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[20]Barcelona Traction Light and Power Co., Ltd., 1970 I.C.J. 1, 32.

of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties."[21]

From the point of view of international law, a State indeed acts in the international arena primarily as a custodian of its national interests, and those interests may not necessarily coincide, or be compatible with, the interests of other States. In the case of fundamental human rights, however, international law is not confronted with conflicting interests of particular groups, but with the common interests of all human beings. Therefore, conceptions about

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[21]Reservations to the Convention on Genocide, 1951 I.C.J. 15, 23; See also Inter-American Court of Human Rights, Advisory Opinion OC-2/82, September 24, 1982, para. 29; European Commission on Human Rights, Application No. 788/60, 4 European Y.B. of Human Rights, 116, 140 (1961).

Divergence of views regarding the best mode of observance of some human rights is to be differentiated from dissonance as to the

reciprocal exchange of commitments among States and notions that the inter-state bargain that underlies an international norm falls, if not faithfully lived up to by the parties in intrastate practice, are not quite relevant, or as relevant, to the formation of international law relating to the elemental rights of the human person.[22] And when it comes to assessing practice and opinio juris of particular States in this domain, their behavior and pronouncements need be held up to exacting standards of good faith and

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core content of such rights when it comes to the question of a consensual balance.

[22]See Schachter, Crisis of Legitimation in the United Nations, 50 Nordisk Tidsskrit For International Ret 3, 33 (1982) and Henkin, Introduction, in The International Bill of Rights: The International Covenant on Civil and Political Rights 1,8 (L. Henkin, ed. (1984) [hereinafter "Henkin, ed."], where the authors voice a view in a similar vein. See also Filartiga v. Pena-Irala, 630 F. 2 876, 884 n. 15 (2d Cir. 1980), where the Court stated that widespread contravention of the international customary norm prohibiting torture did not negate its legal force.

subjected to rules of strict accountability.[23]

Underlying these propositions is the fact that the jurisprudential underpinnings of human rights are central to the raison d'être of law itself. And human thought, legal theory, and philosophy as of the beginnings of civilization are permeated with the concept of the inherent and inalienable rights of man--from the Hellenic Stoics and Roman philosophers to St. Thomas Aquinas, Grotius (the father of international law), Locke, Paine, Milton and Blackstone, among others, as well as the American Declaration of Independence and the French Declaration of

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[23]See Nuclear Test Cases, 1974 I.C.J. 457, where the International Court of Justice held France to its word (unilateral-at-large statements of intention to cease nuclear testing in the Pacific). See also Franck, Word Made Law: The Decision of the ICJ in the Nuclear Test Cases, 69 Am. J. Int'l L. 612, 619 (1975).

the Rights of Man and Citizen.[24] (This concept has found recognition in the United Nations Charter and Universal Declaration of Human Rights,[25] which take for granted the pre-existence of universal human rights.[26]) It is these jurisprudential credentials (tradition; pre-eminence; fundamental,

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[24] See generally H. Lauterpach, An International Bill of the Rights of Man 18-64 (1945); F. Castberg, Natural Law and Human Rights: An Idea-Historical Survey, in International Protection of Human Rights: Proceedings of the 7th Nobel Symposium 13-29 (Eide and Schou eds. 1967).

[25] G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (December 10, 1948) Preamble and Art. 1 [hereinafter "Universal Declaration"].

[26] See supra text accompanying note 18 for Judge Tanaka's view that human rights are based on natural law. In the same opinion Judge Tanaka pointed out that "the Charter presupposes the existence of human rights and freedoms which shall be respected; the existence of such rights and freedoms is unthinkable without corresponding obligations...and a legal norm underlying them. Furthermore, there is no doubt that these obligations...also have a legal character by the very nature of the subject matter." 1966 I.C.J. 289-290. See U.N. Charter, Arts. 1(3), 55(c).

ontological and transcendent nature on all levels and planes of human society and governance; and versatility when it comes to the subject-matter jurisdiction of the International court) that ensure to human rights speedier and smoother passage across the international juridical threshold.

Furthermore, there is strong evidence that at least the more fundamental human rights are to be considered norms of jus cogens. The concept of jus cogens has been codified in the Vienna Convention.[27] It is apparent from the wording of the Article (supra note 27) that acceptance by all States

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[27] See Vienna Convention, supra note 14, Article 53, which reads: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

is not necessary to the establishment of a norm of jus cogens. As the text clearly shows, jus cogens norms are absolute, imperative norms that cannot be derogated from by any member of the international community. This is true even of States which might have consistently opposed them.[28]

The Commentary of the International Law Commission to the draft articles of the Vienna Convention states that, before it was decided not to include in this article examples of some of "the most obvious and best settled rules of jus cogens," human rights norms were among the examples contemplated for listing.[29] In the South West African Cases,

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[28]This was acknowledged recently by the Inter-American Commission on Human Rights in Roach, supra note 12, at 33. The Commission, moreover, found that in "the OAS there is recognized a norm of jus cogens which prohibits the State execution of children." Id. at 36.

[29]Documents of the Conference on the Law of Treaties 1968-1969, U.N. Doc. A/CONF. 39/1/Add.2, at 7 and 68 (emphasis added).

Judge Tanaka of the International Court expressed the view that human rights are part of the jus cogens (see supra text accompanying note 18); and the same Court, in Barcelona Traction, referred to obligations of States "concerning the basic rights of the human person" as "obligations erga omnes (see supra text accompany note 20). The Inter-American Commission on Human Rights in Roach posed, but did not address, the question of whether this language "is intended to mean that all codified human rights provisions contained in international treaties are embraced by the concept of jus cogens" (supra note 12, at 35-36). Certainly, however, the right to life qualifies as a "basic right of the human person," even had it not been repeatedly affirmed in international instruments.

B. Supremacy of International Law over Laws and Practices of the Individual States of the Union

The international agreements which forbid the execution of juveniles are clearly self-executing in view of the immediacy and the imperative tone reflected in their respective texts (and even in case of some doubt, the settled rule is that a treaty is presumed to be self-executing).[30] Courts in the United States are bound to apply stipulations in self-executing treaties, as well as norms of customary international law,[31] and to invalidate contravening laws or actions of state or local governments under the Supremacy Clause, Article VI, Clause 2, of the United States Constitution.[32] Ware v.

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[30] See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 131 (T.D. No. 6, Vol. 2, April 12, 1985).

[31] Id.

[32] See also U.S. Constitution, Art. I, Sec. 8, Clause 10, which reflects recognition of federal supremacy over issues involving the "Law of Nations."

Hylton, 3 Dall. 199, 236-237 (U.S. 1796); Baker v. Carr, 369 U.S. 186, 212 (1962); The Paquete Habana, 175 U.S. 677 (1900).[33] This brief will next list the treaty and customary international law norms that are binding on the United States and which forbid the execution of youth below the age of eighteen at the time of the offense for which death is sought to be imposed.[34]

C. Treaty Stipulations, and Other Provisions Qualifying as Conventional Rules, Binding on the United States, by Reason of Which Execution for Crimes of Juveniles Under Eighteen is Prohibited.

The arguments under this rubric are to be distinguished from the argument that the

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[33] See also Oyama v. California, 332 U.S. 633, 649-650 (1948); First Nat'l City Bank v. Banco Para el Commercio Exterior de Cuba, 462 U.S. 611, 622-623 (1923); Filartiga v. Pena-Irala, 630 F.2d 876, 880-890 (2d Cir. 1980); Rodriquez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385-1390 (10th Cir. 1981).

[34] "For purposes...of liability to capital punishment, the age of the offender is universally determined as that of the date of the commission of the crime, not of the date

United States is bound under customary international law, as codified in Article 18 of the Vienna Convention (see supra note 14), to refrain from acts which would defeat the object and purpose of treaties prohibiting the execution of juveniles that it has signed but not yet ratified. This valid argument has received full treatment in the companion briefs and need not be reiterated.

Instead, emphasis will be placed on provisions fully binding on the United States as conventional rules (not just on an interim basis or as a stopgap measure, albeit of indefinite duration). The most obvious examples of these by now are the Charter of the Organization of American States[35] as amended by the 1967 Protocol of Buenos

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of the trial or punishment." U.N. Department of Economic and Social Affairs, Capital Punishment: Developments 1961-1965, U.N. Doc. ST/SOA/SD/10, at p. 14, para. 45 (1967).

[35] 2 U.S.T. 2394, T.I.A.S. No. 2361 (entered into force December 13, 1951).

Aires,[36] on the basis of which, through subsequent acceptance (as affirmed in Roach, supra note 12, at 30), the American Declaration of the Rights and Duties of Man[37] became binding; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Article 68).[38]

The American Declaration of the Rights and Duties of Man provides in relevant parts that "[e]very human being has the right to life, liberty and the security of his person" (Article I); that all have the right to equality before the law (Article II); that "all children have the right to special protection, care and aid" (Article VII); and

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[36] T.I.A.S. No. 6847, O.A.S.T.S. No. 1-A, O.A.S.O.R., O.E.A./Ser. A/2, Add. 2 (entered into force February 27, 1970).

[37] O.A.S. Res. XXX, 1948, O.A.S.O.R. O.E.A./Ser. L/V/1.4, Rev. (1965).

[38] 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

proscribes "cruel, infamous or unusual punishment" (Article XXVI). In Roach (supra note 12, at 40), the Inter-American Commission on Human Rights found that the execution of the juveniles Roach and Pinkerton for crimes committed while under the age of eighteen violated Articles I (right to life) and II (right to equality before the law) of the American Declaration. The Commission held that in "the OAS there is a...norm of jus cogens which prohibits the State execution of children" (supra note 12, at 36).

As for the Geneva Convention, which explicitly prohibits execution of juveniles under the age of eighteen at the time of the offense (supra note 38, Article 68), and which is ratified by 165 States, including the United States, it cannot be denied that it establishes a treaty rule binding a fortiori in peace time as well, in view of the fact that it is indeed during times of war or

national emergency only when treaties and general international law allow derogation, if at all (the prohibition against execution of juveniles is non-derogable), from human rights norms.

Over and above these instruments, however, the United States is bound by the Charter of the United Nations, which proclaims "the dignity and worth of the human person" (Preamble); establishes the "promot[ion]" of "universal respect for, and observance of, human rights" as one of its purposes (Articles 1, 55(c); and "pledge[s]" all Member States "to take joint and separate action in cooperation with the organization for the achievement" of this and its other purposes (Articles 55(c), 56). It is now settled that, by virtue of these provisions, the Charter imposes legal obligations on Member States to severally and jointly

respect and promote human rights.[39] Surely, promotion of human rights means pushing forward and expanding the protection of the human person, not going back or reneging on norms already established. The United States, therefore, will not be faithful to its legal pledge to promote human rights[40] if a repudiation of its commitment under the Geneva Convention of 1949, through acquiescence to the enforcement of statutes

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[39] See Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 57; Montreal Statement of the Assembly for Human Rights of March 27, 1968, reprinted in 9(1) J. Int'l. Comm'n of Jurists 94; Schwelb, The International Court of Justice and the Human Rights Clauses of the Charter, 66 Am. J. Int'l L. 337, 341-350 (1972); Sohn, The Human Rights Law of the Charter, 12 Tex. Int'l L.J. 129, 131 (1977).

[40] See generally, Schachter, The Charter and the Constitution: The Human Rights Provisions in American Law, 4 Vand. L. Rev. 643 (1951).

such as the one now before this Court, is allowed to stand.[41]

It is in pursuance of the Charter's mandate on human rights, moreover, that the United Nations has elaborated the many human rights instruments currently in existence.[42] Foremost is the Universal Declaration of Human Rights (supra note 25) (that the United States took the lead in elaborating,voted for, and has invoked against other nations), which is now looked upon as the ius constituendum of the Charter[43] with regard to

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[41] As the Inter-American Commission on Human Rights has observed, "human rights...always represent progress with respect to the preservation of human dignity and never a regression to situations that were regarded as having been overcome." IACHR, Annual Report, 1982-1983, OEA/Ser. L/V/II/61 Doc. 22, Rev. 1, at 159 (1983).

[42] See UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev. 1 (1978). Their preambles invariably make reference to the Charter.

[43] The wording of its Preamble makes its direct link to the Charter abundantly clear.

the term "human rights" and as part of international law.[44] The Declaration affirms the "inherent dignity and worth of the human person" (Preamble, Article 1); the right of everyone to "life, liberty and security of person," set out in unqualified terms (Article 3); the right to freedom from "torture or cruel, inhuman or degrading treatment or punishment" (Article 5); the

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[44] That is the position taken with regard to at least the civil rights enunciated in the Declaration. It is based on the provisions of Article 38 of the Statute of the International Court of Justice (supra note 13). It is supported by either one, or both, of the following propositions: (1) most, if not all, of the principles enshrined in the Declaration are "general principles of law recognized by civilized nations"; and (2) by subsequent "general practice accepted as law," not only has a customary rule of international law emerged whereby the Declaration has become accepted as an authoritative interpretation of the Charter provisions on human rights, and is as such binding on all member States of the United Nations (see supra note 39 and accompanying text), but moreover by reason of "general practice," the Declaration has also become part of general customary international law independent of the Charter, and thus binding on all Member States alike. See e.g.,

right to equality before the law and equal protection of the law (Article 7); and that "childhood [is] entitled to special care" (Article 25(1)).

These are provisions comparable to those of the American Declaration on the basis of

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Humphrey The Universal Declaration of Human Rights: Its History, Impact and Juridical Character, in Human Rights: Thirty Years After The Universal Declaration, 27-37 (B.G. Ramcharan ed. 1979). In the Declaration of Teheran, the official International Conference on Human Rights (April-May 1968) also set forth the conclusion that the Universal Declaration "constitutes an obligation for the members of the international community." U.N. Doc. A/CONF. 32/41, at 4. In December of 1968, the General Assembly endorsed the Declaration of Teheran. G.A. Res. 2442 (XXII), 23 U.N. GAOR, Supp. No. 18, U.N. Doc. A/7218, at 49. See also the separate opinion of Judge Ammoun in Barcelona Traction, supra note 18; and the article by Judge Lachs, The Law in and of the United Nations, 1 Ind. J. of Int'l L. 1960-61, at 429, 437-442. This view is shared even by the positivist Russian school of international law. See Tunkin, The Legal Nature of the United Nations, 3 Recueil des Cours 7, 32-37 (1966). The same view was expressed officially by then United States Secretary of State Henry Kissinger. See E. McDowell, Digest of United States Practice in International Law 1976, at 138 (Dept. of State Publication, 1977).

which the Inter-American Commission on Human Rights held adversely to the United States after finding that, by subsequent acceptance, that Declaration had acquired the binding force of conventional law (see supra, text following note 38 and text accompanying notes 35-37). By the same token, the Universal Declaration has, by subsequent acceptance, become an obligatory instrument. Therefore, by the same reasoning, its own affirmation of the right to life and equality before the law, coupled with the other provisions singled out above, operates, through the mandate of the Charter, to impose an obligation on the United States not to execute juvenile offenders.

Moreover, all the provisions of the Universal Declaration have by now been incorporated into several binding international (as well as regional) agreements, in addition to solemn declarations, by the General Assembly and other organs. These concretize, amplify and elaborate the norms set forth in

broader terms in the Universal Declaration and consistently make specific reference to the latter in their preambles.[45] The International Covenant on Civil and Political Rights, adopted unanimously by the General Assembly (including the United States) in 1966,[46] is the foremost. Its Preamble clearly links it to the Charter and the Declaration and affirms "recognition of the inherent dignity" of all persons (see also Article 10). Article 6(5), which forbids execution of

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[45]This aspect is factored into the equation which makes for the conclusion that, through international practice, the Declaration is recognized as laying down binding norms. Additionally, the Declaration has not only been invoked against States, but been cited and recited in a plethora of important resolutions of the General Assembly of the United Nations, often in mandatory terms and on an equal footing with the Charter. See e.g., G.A. Res. 1514 (XV, 15 U.N. GAOR, Supp. No. 16 at 66, U.N. Doc. A/4684 (1960); G.A. Res. 1904 (XVIII), 18 U.N. GAOR, Supp. No. 16, at 35, U.N. Doc.A/5515 (1963).

[46]G.A. Res. 2200 (XIX), 21 U.N. GAOR, Supp. No. 16, at 52-58, U.N. Doc. A/6316 (1966) [hereinafter Covenant"].

youth under eighteen at the time of the offense, opens with an affirmation of "the inherent right to life," calls for restriction of the death penalty, and contains an indirect appeal for its total abolition.[47] It is apparent, therefore, that the limitations the Covenant places on executions represent the maximum concessions to retentionist States. (It need not be pointed out to this Court that limitations on rights affirmed in sweeping and emphatic terms in instruments of constitutional import are to be strictly construed.) Thus, the age limit of eighteen is to be looked upon as the absolute minimum that the Covenant countenances. This is also borne out by the

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[47] The Human Rights Committee established under the Covenant to monitor its implementation has stated that the "article also refers generally to abolition in terms which strongly suggest that abolition is desirable." U.N. Doc. A/37/40, pp. 93-94, para. 6 (1982). In fact, the United Nations Commission on Human Rights is currently at work on a protocol to the Covenant for the abolition of the death penalty.

travaux preparatoires, as shall be also noted below.

In view of the link between the Covenant and the Universal Declaration, Article 6(5) of the former is a reliable guide to inform the interpretation of the "right to life" provision in the latter.[48] The Covenant provision can, also, according to the Vienna Convention (see supra note 14, Article 31(3)), be used to authoritatively interpret the Universal Declaration by being viewed as a "subsequent agreement between the parties," a "subsequent practice in the application" of the Declaration, and/or as "relevant rules of international law."

The Covenant (like the Universal Declaration) also proscribes "cruel, inhuman

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[48] In the Namibia opinion, the International Court of Justice stressed that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation." See supra note 39, at 31.

or degrading treatment or punishment" (Article 7) and affirms the right to equality before the law and equal protection of the law (Article 26). It, moreover, also specifies that the "penitentiary system shall comprise treatment...the essential aim of which shall be...reformation and social rehabilitation," with juvenile offenders "segregated from adults and...accorded treatment appropriate to their age and legal status" (Article 10(3)); that in the case of juveniles "the [penal] procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation" (Article 14(4)); and that "[e]very child shall have...the right to such measures of protection as required by his status as a minor, on the part of...the State" (Article 24(1)). Thus, the two instruments display a unity of design and purpose, which entitles the latter of the two to be viewed as an interpretational extension of the first. Since the Universal Declaration is binding on

all Member States as the authoritative interpretation of their obligations under the Charter relative to human rights,[49] by process of legitimate teleological interpretation, Article 6(5) is likewise binding on the Member States, regardless of whether or not is was when adopted declarative of customary international law or whether or not it has, since then, acquired the status of an international customary rule.

This is not an attenuated way of imposing norms on States, inasmuch as both Article 6(5) and 7 of the Covenant (the most relevant here) allow of no derogation (even in emergency). This signifies that the norms they embody lie at the core of the human rights mandate of the Charter; that they necessarily and properly flow from the Charter's matrix of international human rights law. (It is not suggested that the thesis posited above would

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[49] See supra notes 43-44 and accompanying text.

apply to rights which do not fit this description.)

It might be argued that since the United States upon ratification of the Covenant can make a reservation to Article 6(5), it cannot be held bound by it as a conventional rule.[50] But as the Covenant makes no provision for reservations, the matter is governed by general rules of international law regulating the admissibility and legal effect of reservations.[51] Accordingly, such a reservation would not be acceptable in view of its obvious incompatibility with the object and purpose of the treaty (Vienna Convention,

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[50]A reservation would be of no import if the Article is declaratory of customary law unless the reserving State has been a consistent ab initio objector. See supra note 17 and accompanying text.

[51]Principles enunciated in the Advisory Opinion on Reservations to the Convention on Genocide, 1951 I.C.J. 15 and codified in Articles 19-21 et seq. of the Vienna Convention (see supra notes 14, 21).

Article 19).[52] The fact that the existing laws and practices of individual states of the United States do not happen to conform to the norm under discussion is to no avail. It is well settled that a nation may not plead its domestic laws as justification for failure to abide by a treaty, any more than for failure to observe rules of customary international law.[53]

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[52]Id. See also Inter-American Court of Human Rights, Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC - 3/83, September 8, 1983, para. 61: "a reservation...designed to enable a State to suspend any of the non-derogable...rights must be deemed to be incompatible with the purpose and object of the Convention and, consequently not permitted by it". According to information supplied by the United Nations Office of Legal Affairs, no reservations, indeed, to Article 6(5) have been entered by any of the 87 ratifying states.

[53]See Schachter, "The Obligation to Implement the Covenant in Domestic Law," in Henkin, ed., supra note 22, at 311, 322.

D. The United States Is also Bound by International Customary Law, and International Law Deriving from Principles of Law Recognized by Civilized Nations, that Forbid Execution of Youth for Culpable Conduct While Under Eighteen

Besides the direct legal obligation imposed on it by the aforesaid conventional rules, the United States is bound by other (or the same but differently classified) rules of international law that regulate the issue (and this is so irrespective of whether it is also bound by any treaty qua treaty). In considering this aspect, the provisions in treaties and other international and regional instruments are again relevant, albeit from a different standpoint. Also relevant are the inter-State practices of States, as well as their internal laws and practices.

In addition to the stipulations in the Geneva Convention, the Universal Declaration, the American Declaration and the Covenant (see supra text accompanying notes 38-49), there are: a) The American Convention on Human

Rights (Article 4)[54]; Protocol II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-international Armed Conflicts (Article 6(4)),[55] both of which have been signed by the United States and explicitly prohibit the execution of youths committing crimes when under eighteen; b) Protocol No. 6 to the European Convention on Human Rights[56] which abolishes capital punishment altogether; c) Draft Convention on the Rights of the Child, adopted by the

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[54]OASOR OEA/Ser. K/XVI/I.1, Doc. 65, Rev. 1, Corr. 2 (November 22, 1969) [hereinafter "American Convention"]. Its preamble links it to the Universal Declaration and it contains in Articles 5, 19 and 24 essentially the same provisions as the Covenant catalogued supra in text accompanying notes 46-47 and preceding note 49.

[55]Submitted to the Senate on December 13, 1986 for ratification. Message from the President, 100 Cong., Treaty Doc. 100-2, 1987.

[56]Opened for signature April 23, 1983, 1983 Europ. T.S. No. 114.

Working Group on the Convention of the United Nations Commission on Human Rights, which prohibits capital punishment or life imprisonment for crimes committed by those under eighteen, as well as cruel, inhuman or degrading treatment (draft article 19(2)(a-b).[57]

Additionally, there is the United Nations Declaration of the Rights of the Child, unanimously adopted by the General Assembly.[58] Its preamble expressly relates it both to the United Nations Charter and the Universal Declaration; underscores that the child needs "special safeguards" and "legal protection"; and expressly reminds that the need for such special safeguards had been already affirmed in the Universal

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[57] See U.N. Doc. E/CN.4/1986/39, Appendix.

[58] G.A. Res. 1386 (XIV), U.N. Doc. 4354, at 19 (November 20, 1959).

Declaration,[59] in the prior Geneva Declaration of the Rights of the Child of 1924[60] and in other instruments of global reach.[61] The preamble, moreover, reiterates the principle enunciated in its progenitor[62] that "mankind owes to the child the best it has to give." Among its ten operative principles, the Declaration states that the child "shall enjoy special protection"

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[59] Article 25 (1). See supra text following note 44.

[60] The 1924 Declaration was adopted by the Assembly of the League of Nations and was based on the Charter of the International Union for Child Welfare. It was minimally revised in 1946 by the latter's General Council. It proclaimed, inter alia, that the "child must be protected" (Article 1 of the 1946 revision) and that "the maladjusted [child] must be re-educated (Articles 2 and 4, respectively, of the original and revised versions).

[61] See also the provisions of special relevance to children in the subsequently enacted Covenant, supra text accompanying notes 46-49.

[62] Geneva Declaration of 1924, supra note 60 and accompanying text.

(Principle 2); and that the child "shall be protected against all forms of...cruelty" (Principle 9).

All United Nations sponsored human rights instruments are expressly linked to the Charter and the Universal Declaration of Human Rights.[63] Thus anyone of these cannot be viewed in isolation. Its juridical impact transcends its own structure. It is part of a larger organic whole, part of a constellation with unity of substance and purpose, meant to move along in unison on the international plateau of law. It has legal value beyond its own individual status as a treaty or a declaration. There is a reciprocity of influence among all of them; they feed upon

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[63]The draft preamble of the proposed Convention on the Right of the Child also refers to the Charter and the Universal Declaration as well as the Declarations of the Rights of the Child of 1959 and 1924. See supra note 57. The regional conventions likewise make reference to the Universal Declaration in their preambles.

each other and converge to produce a cumulative legal effect; and each must be viewed concordantly with the vision that inheres in the scheme to which it belongs.

The repeated affirmations in these instruments regarding the rights of children (right to special protection; right to freedom from "all forms of cruelty" and degrading treatment; right to equal protection of the laws; right to rehabilitation; and, of course, exemption from capital punishment), coupled with the evidence presented by Amicus Amnesty International[64] of formalized and customary refusal by the great majority of nations to impose death on persons under eighteen at the time of culpable conduct, clearly establish that the inadmissibility of such punishment is a principle of law recognized by civilized nations within the meaning of Article 38 of

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[64]Amnesty International, United States of America: The Death Penalty 74 (1987)

the Statute of the International Court of Justice. This is then an international legal norm binding on all members of the international community, regardless of whether or not they consent to it (even if the dissenters themselves generally qualify as civilized nations).[65]

Additionally, the norm qualifies at one and the same time as a customary norm of international law. Because of its dual character in that respect (its eligiblity under more than one test of normative maturation), it would have passed the juridical threshold on the strength of its combined credentials, even if each set of them by itself was of marginal merit.[66] Marginality, however, is by no means the case here, and there is no need to press this ex abundanti cautela argument. This is

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[65] See supra note 44 and text accompanying note 18 for the opinion of Judge Tanaka of the International Court.

reinforced when one examines the norm also from the perspective of international customary law, bearing in mind that the evidence adduced along this route is equally germaine simultaneously in polishing the norm's twin legal armor as a "principle of law recognized by civilized nations."

First, there is solid evidence that the norm belongs to the jus cogens genre. Every instrument which incorporates it admits of no derogation from it.[67] Thus it falls squarely

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[66] See generally supra text accompanying notes 19-26.

[67] See Covenant, supra note 46, Art. 4(2). See also American Convention, supra note 54, Art. 27(2). Even the prohibition of the Covenant against not only cruel, but degrading, punishment or treatment is not derogable (see id), which illustrates by comparison the supreme importance of the norm against execution of juveniles. The American Convention (see id) additionally makes non-derogable not only the prohibition of cruel or degrading punishment or treatment (Article 5(2), but also "the right" of the child to such measures of protection as are required by his status as a minor (Article 24). See also Arts. 3-4 of Protocol No. 6 to the European Convention (see supra text accompanying note 56).

within the jus cogens definition of the Vienna Convention (see supra note 27), not to mention the various authoritative references to basic human rights norms as being jus cogens.[20] The United Nations Commission on Human Rights has, indeed, accepted the thesis that this and other non-derogable norms are inalienable and peremptory within the meaning of the Vienna Convention.[21] By definition, of course, a jus cogens norm is binding on one and all, even dissenters (see supra note 27 and accompanying text). In view of the above, any further inquiry can be deemed foreclosed; there is no need to survey practices of States nor to examine the attitude of the United States with regard to any aspect of the matter.

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[20] See supra text accompanying and following note 29.

[21] See U.N. Doc. E/CN. 4/Sub. 2/1982/15, pp. 18-19, para. 67 et seq.

Assuming arguendo that the norm does not qualify as jus cogens, or even as a principle of law recognized by civilized nations, which is by no means conceded, its mere candidacy for these mantles adds a lot of extra weight to the proposition that it qualifies as a norm of customary international law. Even if one discounts the thesis that human rights norms more readily pass into the juridical mainstream (see supra text accompanying notes 19 to 26), the evidence is overwhelming that this particular norm has done so. A few of the applicable considerations merit emphasis.

A stipulation in a treaty is binding on non-parties if it is declaratory of a pre-existing norm of customary law or if it subsequently acquires the status of a customary rule (Vienna Convention, supra note 14, Article 38). The rule under discussion had been universally accepted in the Geneva Convention (supra note 38) for seventeen

years prior to the adoption of the Covenant (see supra text accompanying notes 46-49) (and had even pre-dated the Convention[70]). The drafters of the Covenant took it as a given that execution of juveniles was a proscribed thing.[71] The proscription was thus already a customary rule.

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[70]See III Final Record of the Diplomatic Conference of Geneva of 1949, Annexes, p. 131, Art. 59; International Committee of the Red Cross, Commentary, IV Geneva Convention, p. 347.

[71]The Working Group of the Committee of the General Assembly working on the Covenant (Third Committee), after considering a proposal that would exclude from the death penalty "children and young persons" (Japan), recommended to the Committee that it choose from among the following words: "minors," "juveniles," and "persons below eighteen." The Committee opted for the last as being the most succinct. Report of the Third Committee U.N. Doc. A/3764 (1957), 12 GAOR, Annexes, Agenda It. 33, pp. 10-11, paras. 93, 105. Prior to the vote the U.K. representative objected to the term "minors" as it "specifically meant persons under twenty-one." 12 GAOR, C.3/SR. 820, para. 3 (25 Nov. 1957). Other reasons for the choice made were that it was in harmony with the practices of most countries; was the prescription used in the Geneva Convention of 1949; and would impose an equal obligation on all States. Id.

The Covenant thereafter became widely ratified by nations representing all regions and legal systems (eighty seven nations so far and increasing each year), all unreservedly acceding to its Article 6(5) (see supra note 52).[72] "[A] very widespread and representative participation in the convention [can] suffice of itself" to transform a treaty stipulation (a purely conventional rule) into a rule of customary law, "even without the passage of a considerable length of time." North Sea Continental Shelf Cases, 1969 I.C.J. 42. (The treaty by itself, under the circumstances provides the requisite elements

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para. 21; id. SR. 812, para. 25; id. SR. 813, para. 32; id. SR. 817, para. 33; id. SR. 819, para. 10. Thus the age of eighteen was seen as the minimum cutoff point.

[72]The delay by some States in ratifying the Covenant can be attributed to such factors as its burdensome reporting procedures, which no doubt some States are not too anxious to undertake.

of State practice and opinio juris, without the need to examine other items[73]). A fortiori we have a customary rule of international law when, as here, the rule has been codified for twenty-two years (counting as of the adoption of the Covenant alone); was recognized as a customary rule beforehand; was reaffirmed in other normative instruments thereafter, including the American Convention (see supra note 54) and such as the Resolution by the General Assembly of 1980 (for which the United States voted) endorsing the view that Article 6 of the Covenant constitutes "a minimum standard" for all Member States (not just ratifying States)[74];

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[73]See generally Baxter, Multilateral Treaties as Evidence of Customary International Law, XLI Brit. Y.B. Int'l L. 275 (1965-1966).

[74]G.A. Res. 35/172, 35 U.N. GAOR, Supp. No. 48, U.N. Doc. A/35/48, at 195 (1980). Like a treaty, a resolution of the General Assembly can be viewed as a constitutive element of State practice or as evidence of State practice, or both, as well as a vehicle for expressing opinio juris. Important,

and is amply reflected in intrastate practice.

Even as an ordinary rule of customary international law (even if not jus cogens or a rule deriving from "principles of law recognized by civilized nations") the norm embodied in Article 6(5) of the Covenant is binding on the United States, being that this country does not qualify as an ab initio consistent objector, as the evidence presented in this and in companion briefs conclusively shows (the long-standing full adherence of the United States to the Geneva Convention of 1949 alone should be determinative here).[75] An important consideration in this connection is the fact

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broadly supported resolutions can, moreover, be viewed as a source of international law, additional to treaty and custom. See the Namibia opinion supra note 39, at 50-57; Western Sahara Case, 1975 I.C.J. 12; separate opinion of Judge Ammoun supra note 18.

[75]See AMNESTY INTERNATIONAL brief on the travaux preparatoires of the International Covenant and the American Convention on Human Rights.

that any expressed reservations on the part of United States officials with regard to provisions such as Article 6(5) of the Covenant have been voiced in terms of the inconvenience and delicate internal jurisdictional considerations that such stipulations would entail by reason of the inconsistency between them and current laws in the United States. This is not a substantive reservation; not an objection in principle.[76] Moreover, United States diplomatic representatives have seen fit not to dissent against, and even support, United Nations resolutions re-affirming the norm

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[76] See supra text accompanying note 53 regarding the import of pleading domestic law as against international standards. The purpose of international human rights law is to uplift national standards and not to emulate the least common denominator.

(such as the resolutions on Article 6(5) of the Covenant and "The Beijing Rules").[77]

Thus the prohibition contained in Article 6(5) of the Covenant and other international instruments is part of the federal common law and ipso jure supercedes contravening state legislation. It should, at least be held to conclusively inform this Court's interpretation of relevant provisions of this nation's Constitution (particularly as, even in its absence, such interpretation cries for the same result). Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 1, 43 (1804); Weinberger v. Rossi, 456 U.S. 25, 33 (1982).[78]

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[77] See supra note 74 and accompanying text; AMNESTY INTERNATIONAL brief, footnote (as to President Carter's Message to the Senate of Feb. 27, 1978) and text preceding the "Conclusion".

[78] See also, Schachter, supra note 53, at 315.

CONCLUSION

For the reasons above stated, Amicus DCI prays that this Court spare the life of the petitioners; and strike down laws, such as the statutes under review, which allow such unconscionable cruelty to be perpetrated on persons of young age. Surely, in this day and age, the state-killing of petitioners ,or others like them, is not "the best that mankind has to give" our children. Opening the door to such practices would be the ultimate betrayal of a sacred trust of civilization. It would be a giant retrograde step of global proportions in the progressive development of the rule of law.

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